FILED
JAN 15 1997

No. 96-964

In The

Supreme Court of the United States

October Term, 1996

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

ANNE C. TROSTEL, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JOHN R. CALDWELL
29 Ardmore Highway
P.O. Box 898
Fayetteville, TN 37334

JAMES M. DORAN, JR.
Counsel of Record
JOHN E. QUINN
JOHN W. HEACOCK
MANIER, HEROD, HOLLABAUGH & SMITH
A Professional Corporation
First Union Tower, Suite 2200
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-0030

Attorneys for Respondents

70362
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

STATEMENT OF PARTIES AND CORPORATE AFFILIATES PURSUANT TO RULE 29.6

Norwest Bank Colorado, N.A. is a party respondent. Norwest Bank Colorado, N.A. serves as Trustee for one Robert Sears, one of the heirs of John Trostel. Norwest Bank Colorado, N.A. has no non-wholly owned subsidiaries. Its parent corporations are Goldenbanks of Colorado, Inc., Ken-Coryl Investment Company, Norwest Colorado, Inc. and Parker Bankshares, Incorporated.

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STATEMENT OF THE CASE

On June 27, 1917, John Trostel entered into an agreement with Morris and Jacob Joseph for the lease of land and a building in Des Moines, Iowa. The annual rent was $12,000 for the first five years, $15,000 for the next forty-nine years, and $18,000 for the remaining forty-five years. The lease also provided that "[a]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." Resp. App. 1a. Prior to the Depression era, gold clauses such as this were frequently included in long-term agreements as a price-indexing mechanism to protect against the effects of inflation. *See Rudolph v. Steinhardt*, 721 F.2d 1324 (11th Cir. 1983) (providing history behind gold clauses); *see also* Kenneth W. Dam, FROM THE *GOLD CLAUSE CASES* TO THE GOLD COMMISSION: A HALF-CENTURY OF AMERICAN MONETARY LAW, 50 U. Chi. L. Rev. 504 (1983). The lease required ninety days written notice as a condition precedent to the right to demand payment in gold coin.

As part of the lease, the Josephs agreed to construct a new building on the property. The lease allowed the lessees the right to transfer or assign their interest in the lease and provided that once the new building was completed, an assignment would relieve them of any further liability under the lease. Subsequently, the lease was amended several times, by supplemental agreements in 1921, 1927, and 1930, and by an amendment in 1959. These modifications related to the deadline for constructing the building and the use of an agent for collecting and receiving the rent. In exchange for the lessors' agreement in the 1930 Amendment to co-sign a mortgage, the parties increased the schedule of rent by $5,000, resulting in the current rent of $23,000 per year. In 1931, a fourteen-story office building was completed and is now known as the Des Moines Building. John Trostel's interest in the property is now

owned by his heirs, the seven named plaintiffs ("the Trostel heirs").

The United States' policy and legal treatment of gold radically changed in the 1930s as a result of the worldwide Depression. To enable President Roosevelt to devalue the dollar, the United States was taken off the gold standard. Fearing that the public would use gold to circumvent the devaluation, Congress also banned the private ownership of gold. Accordingly, a joint resolution of Congress in 1933 declared gold clauses "to be against public policy" and unenforceable. Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463, codified as amended at 31 U.S.C. § 5118(d)(2)).

In 1975, Congress repealed the now-anachronistic ban on private ownership of gold, and in 1977 it amended the gold clause statute. The amendment provided that the terms of the 1933 statute would not apply to "obligations issued after October 27, 1977." Pub. L. No. 95-147, § 4(c), 91 Stat. 1277, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)). As a result, after October 27, 1977, it was once again legal to contract for payment in gold.

The lessee's interest in the lease of the Des Moines Building has been transferred several times. On August 15, 1990, the lessee, The Statesman Group, Inc. ("Statesman"), transferred its interest to Petitioner, American Life & Casualty Insurance Company ("American Life"), pursuant to a Warranty Assignment and Assumption Agreement. The 1990 Warranty Agreement, which is the basis of the current lease, specifically incorporated all of the terms of the 1917 lease:

> The Statesman Group . . . does hereby sell, transfer, assign and setover unto American

> Life and Casualty Insurance Company, an Iowa insurance corporation ("Grantee") the leasehold estate ("Lease") *more particularly described in that certain Lease dated June 27, 1917* . . . .

Resp. App. 3a (emphasis added).

Statesman warranted that the lease had not been modified (except pursuant to the aforementioned amendments) and was "in full force and effect." *Id.* The Warranty Agreement also provided that American Life:

> hereby accepts, assumes, and agrees to be bound by *all of the terms and conditions* to be kept, observed and performed by the Lessee in said Lease, as amended above described, from and after August 1, 1990, and covenants and agrees to faithfully comply with, carry out and perform *all of the terms and covenants on the part of the Lessee under said Lease* . . . .

Id. (emphasis added). Consequently, Statesman was relieved of any further obligations under the lease.

In a letter dated December 27, 1993, an attorney for the Trostel heirs demanded payment from American Life in gold coin, pursuant to the terms of the 1917 lease. On March 25, 1994, within ninety days of receiving the demand, in an attempt to pay off the lease and avoid paying in gold coin, American Life delivered a cashier's check for $515,583.33 with a letter stating that this amount fulfilled the remaining rental obligation through the year 2016. The Trostel heirs' attorney instructed the agent for receipt of rents to refuse the tender and return the

check to American Life. American Life has refused to accept the check back and has not paid rent on the Des Moines Building since that time.

REASONS FOR DENYING THE WRIT

None of the reasons offered by American Life in its Petition for Writ of Certiorari satisfy this Court's standards for accepting a case for review. Rule 10 of the Supreme Court Rules requires "compelling reasons" for granting certiorari and sets forth several categories of considerations indicating which cases deserve discretionary review on certiorari. None of those considerations or compelling reasons exist in this case.

I. THERE IS NO SPLIT OF PERTINENT LEGAL AUTHORITY.

The first basis for granting certiorari listed in Rule 10(a), that a federal court of appeals has ruled contrary to another federal court of appeals or state court of last resort, does not apply to this case. "[T]he absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., opinion in denial of certiorari). "Certiorari is granted only . . . 'in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (citation omitted).

The dispositive issue in this case, stated precisely, is as follows: where a court first determines that an assignment of a lease constitutes a novation, and that lease contains a pre-1933 gold clause, is that clause rendered enforceable as a new obligation entered into after October 27, 1977? The two courts that have addressed this question have both found a novation and enforced the gold clause, as did the Eighth Circuit in this case.

In the earliest case to address the issue, *Fay Corp. v. BAT Holdings One, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd*

sub nom., Fay Corp. v. Frederick & Nelson Seattle, Inc., 896 F.2d 1227 (9th Cir. 1990), the Ninth Circuit upheld a district court's detailed opinion enforcing a revived gold clause. In 1929, The Fay Corporation executed a 99-year lease of land and premises in downtown Seattle for $8,333 monthly rent, which was payable at the lessor's option in "lawful gold coin of the United States of America of the present standard of weight and fineness." 646 F. Supp. at 948. The leasehold interest was transferred several times before 1982, when the lessee in possession transferred its leasehold rights via an "assignment" to BAT Holdings I, which the district court found "explicitly assumed [the lessee's] obligations under the lease. *Id.* at 948-49. As a preliminary matter, the court in *Fay* held that, under Washington contract law, the transfer was a valid novation. *Id.* at 950-52. As a result, the Ninth Circuit concluded that

> the 1982 transfer . . . creat[ed] a new contractual obligation as of August 28, 1982. Gold clauses are enforceable after October 27, 1977, pursuant to section 5118; . . . because it is not a "past obligation" that the amendment is affecting but a new one entered into after the amendment was in force . . . the gold clause contained in the August 28, 1982 contract is enforceable.

Id. at 952-53. The Ninth Circuit "agree[d] with the district court in all respects" except as to a state law issue of waiver that is inapplicable to this case. 896 F.2d at 1227.

Fay is factually and legally indistinguishable from this case. Of even greater importance, *Fay* is based upon virtually identical precepts of *state* contract law concerning novations, as applied to the term "issued after" as used in the amendments to 31 U.S.C. § 5118(d)(2). In *Fay*, as in *Trostel*, state law provides that there

is a novation when there is a new obligor to a contract with a release of the old obligor. In *Fay*, as in *Trostel*, state law provides that when there is a novation, there is a new contract. In *Fay*, as in *Trostel*, the court found that when there was a new contract, a new post-1977 obligation *issued*. Therefore, it is clear that there is *not* a conflict between the Ninth Circuit and the Eighth Circuit, and that when the Ninth Circuit and the Eighth Circuit addressed factually similar obligations based upon analogous state law principles, their holdings are identical.

The only other case that squarely addresses the crucial issue in this case, *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521 (Cal. App. 1995),[1] came to the same conclusion the Eighth Circuit did in *Trostel*, on indistinguishable facts. In that case, the California court of appeals applied its state contract law of novation to the term "issued after" and ruled in complete congruity with the Ninth Circuit in *Fay* and the Eighth Circuit's decision below. The parties in *Wells Fargo* were successors in interest to a 1929 lease of prime Beverly Hills real estate. The equities of that case parallel those in the present case: like the Trostel heirs, the plaintiffs were "a small group of family trusts and individuals" who were seeking to enforce a gold clause in a 95-year lease providing for an annual rent of only $24,000; the current lessee, Triangle Company, was charging its sublessor, the Bank of America, $325,000 per year in rent. 38 Cal. Rptr. 2d at 523-24. In 1981, Triangle and the Bank of America terminated their sublease and, in exchange for $4,225,000, the bank "became the new lessee under the 1929 lease, assuming all obligations owed under it." *Id.* at 524. After one of the plaintiffs read a newspaper account of the *Fay* case, demand

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1. Respondents have not found and Petitioner has not noted any other state court, federal district court, or United States Court of Appeals for any circuit other than the Eighth and Ninth Circuits that have addressed the issues in this case.

was made for payment in gold coin. *Id.* When the Bank of America refused, the plaintiffs filed suit.

The *Wells Fargo* court applied California law and first concluded that the 1981 transaction was a novation and "thus constituted a new obligation." 38 Cal. Rptr. 2d at 525-26. After determining that the phrase "obligation issued" as used in the 1977 amendments was unambiguous, the court held that the novation between the bank and Triangle constituted a new obligation that issued, *i.e.*, was entered into, at a time when gold clauses were valid and enforceable — "In sum, we reach the same conclusion as did *Fay*, the only case to address a gold clause in the context of novation." 38 Cal. Rptr. 2d at 526-29.

American Life attempts to manufacture a circuit split by making an erroneous analogy to a decision, *Adams v. Burlington N.R.R. Co.*, 80 F.3d 1377 (9th Cir. 1996), where the Ninth Circuit flatly refused to find that a novation occurred each time railroad bonds were sold: "The date of issue of bonds is the date when they are *first* issued, not when they are resold." 80 F.3d at 1382 (emphasis in original). In fact, the plaintiff in *Adams* "point[ed] to cases in which novations rendered gold clauses in leases enforceable," specifically, *Fay* and *Wells Fargo*. 80 F.3d at 1382. The Ninth Circuit was unpersuaded and succinctly rejected the proposition that leases and bonds were comparable: "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue." *Id.* In contrast to the case at bar, the Ninth Circuit in *Adams* specifically found that a novation had not occurred, and indeed *could not* occur: "[E]ven if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation." *Id.* at 1383 n.4. The bond holders in *Adams* have already been unsuccessful in persuading this Court that the Eighth and Ninth Circuits are in conflict on an important federal question. *Adams v. Burlington*

N.R.R. Co., 80 F.3d 1377 (9th Cir.), *cert. denied*, 117 S. Ct. 171 (U.S. Oct. 7, 1996) (No. 96-51).

Ironically, the *Wells Fargo* court foresaw and rejected the contention, now renewed by American Life, that there is an analogy between cases involving *bonds* containing gold clauses, such as *Adams*, and other contracts or leases containing gold clauses:

> The bank raises the specter that as to bonds which contain gold clauses, bondholders would only need to sell their bonds to revive the gold clauses for the buyer. However, we note that a bond's date of issue for determining when an "obligation issued" and applying a gold clause has been deemed only the date of the first purchase of the bond, not each purchase or delivery of the bond after its first purchase. Such an interpretation focuses on the legal structure of the bonds *and not novation*.

Wells Fargo, 38 Cal. Rptr. 2d at 528 (emphasis added).

Clearly, and contrary to American Life's assertions, the present case does not present "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *Pittsburgh S.S. Co.*, 340 U.S. at 502, and thus does not warrant review by this Court.

II. THIS ANOMALOUS CASE DOES NOT PRESENT AN "IMPORTANT FEDERAL QUESTION" OF PUBLIC SIGNIFICANCE.

American Life has also failed to satisfy the second condition in Rule 10(a), that any purported circuit inconsistency must concern an "important federal question." Although every party to a lawsuit considers its litigation of great import, certiorari is appropriate only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

Common sense and the unique chronological circumstances of this case serve to discredit American Life's claims that the Eighth Circuit's decision in this case could mean that "countless gold bonds, lease agreements, and other long-term instruments . . . will operate to resurrect previously unenforceable gold clauses, subjecting the issuers of such instruments to potentially crippling liability." Petitioner's Brief at 10. As demonstrated by the Ninth Circuit's holding in *Adams*, and reinforced by the reasoning in *Wells Fargo*, *Fay*, and *Trostel*, any gold clauses that remain in the "countless gold bonds . . . and other long-term instruments" pose no danger of being enforced, much less bankrupting their issuers. Moreover, due to the scarcity of long-term pre-1933 contracts of any sort that remain in force today, it is unlikely that the particular factual context that resulted in a novation in this case would be repeated; the requirement of a post-1977 assignment further reduces the potential pool of gold clause cases to a mere puddle. The few gold clauses that continue to exist in contracts are historic and legal anomalies, as evidenced by the existence of only three cases in the last twenty years that involve attempts to enforce such clauses in leases. As expressed by one Justice of this Court, "in allocating the Court's scarce resources, I consider it entirely appropriate to

disfavor complicated cases which turn largely on unique facts." *Singleton*, 439 U.S. at 945.

American Life attempts to attach some "special or important" significance to this case by implying that the enforcement of the gold option in the lease would operate as a windfall to Respondents. In its brief, American Life repeatedly decries the twenty-fold increase in the rent resulting from the enforcement of the gold clause as an injustice. Petitioner conveniently ignores the fact that the Trostel heirs are receiving only $23,000 per year for prime real estate in downtown Des Moines, with a fourteen-story building connected to adjacent buildings by overhead covered walkways.[2] Surely American Life does not contend that the Trostel heirs are receiving fair value in today's market — the fact that Petitioner attempted to pre-pay the twenty-two years of rent until 2016 is evidence of the undeserved largess it has been receiving. Instead, American Life is fighting to preserve a windfall that resulted from an unanticipated measure taken in response to a worldwide economic depression in 1933.

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2. Similar monetary disparities existed in *Fay* and *Wells Fargo*. In the latter, the court noted that the lessors were receiving $24,000 annually, whereas enforcing the gold clause pursuant to the original agreement increased the rent to between $381,000 and $565,000 per year, depending on the current price of gold. *Wells Fargo*, 38 Cal. Rptr. 2d at 524 n.2. It appears that the lessees in *Fay* chose not to bemoan the inequity of the loss of a rental rate negotiated in 1929.

III. THIS CASE INVOLVES QUESTIONS OF STATE CONTRACT LAW THAT PREDOMINATE OVER ANY FEDERAL ISSUES.

The standards for granting certiorari listed in Rule 10(b) and (c), governing inconsistent state court decisions and state and federal decisions contrary to clear Supreme Court precedent, are also inapplicable on their face to this case. In fact, American Life's complaints about the Eighth Circuit's decision are actually criticisms of well established doctrines of Iowa contract law. In that manner, this case parallels the legal context of the *Wells Fargo* case, where the court stated: "*[W]hether a gold clause originally agreed to prior to 1933 has any effect after the 1977 amendment is simply a matter of contract law and an analysis of the concept of novation under state law.*" 38 Cal. Rptr. 2d at 528 (emphasis added).[3] As such, the Eighth Circuit's determinations of Iowa contract law do not warrant review. American Life's protestations that it never intended to make a substituted contract and that the elements of a novation were not satisfied all relate to the Eighth Circuit's interpretation of state law issues that are preliminary to an analysis of the federal gold clause statutes. These contentions were made before that court, and subsequently raised again in American Life's petition for reconsideration, and the Eighth Circuit has twice rejected them.

The Eighth Circuit correctly interpreted Iowa law. Iowa law provides that "a novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of

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3. Additionally, "[w]e note that California law controls our interpretation of novation, even though our ensuing analysis involves the application of a federal statute. There is no federal law of contracts. State law controls both the construction of the contract and the question of breach." *Wells Fargo*, 38 Cal. Rptr. 2d at 526 n.3 (citations omitted).

the original duty." *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W. 2d 9, 11 (Iowa 1993) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 279 (1981)). All that is required for a novation is that the new obligor be bound to the terms of the original contract, that the old obligor be discharged from any obligation under the contract, and that the obligee assent to the substitution. *Id.* at 11-12; *see Andrew v. American Sav. Bank & Trust Co. of Davenport*, 258 N.W. 921 (Iowa 1935). Such an arrangement is commonly referred to as a "simple novation." RESTATEMENT (SECOND) OF CONTRACTS § 280 cmt. d (1981).

The Eighth Circuit correctly found that a novation occurred in this case and that American Life "specifically agreed to be bound by the obligations described in the 1917 lease and its written amendments." 92 F.3d at 742. The assignment obligated American Life to all the terms of the lease, and it released the assignor, Statesman, from any obligation under the lease. In fact, as the Eighth Circuit pointed out, American Life did not dispute that a valid new obligation was formed. *Id.* at 740. Pursuant to the terms of the lease, the assent of the lessor was granted. In sum:

> [T]here is no question that a valid previous lease obligation existed between Statesman and the lessors, that all parties agreed to a new contract, that the obligations of Statesman were extinguished, and that a valid lease was created between lessors and American Life. . . . American Life does not suggest that the 1990 novation was anything other than a novation.

Id. at 740-41.

American Life argues that the Trostel heirs did not give their "prior consent" to the 1990 assignment, in spite of the fact

that the contract provided for that prior consent and, in fact, would have provided Respondents no opportunity to object to the assignment. Petitioner bases its rather lengthy argument that the 1990 assignment somehow changed the terms of the lease upon its assumption that the lease at that time lacked a gold clause. As the Eighth Circuit correctly held, the lease always contained the gold clause, but that clause was merely unenforceable until after 1977. The 1990 assignment did not create or add any lease terms or obligations that had not been there before.[4]

American Life's complaint that it did not intend to accept a lease containing a gold clause is legally irrelevant, and this argument has twice been rejected by the Eighth Circuit. American Life's intent in the contract is unambiguous and is represented by the clear terms of its signed, written agreement, not by its after-the-fact assertions of subjective intent. The 1990 Warranty Agreement was an arm's length transaction between two corporate entities with extensive business expertise. Both Statesman and American Life had the advice of sophisticated legal counsel. The failure of the two people who claim to be the most familiar with the transaction, the president and the chief financial officer of American Life, to read the lease or to form a

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4. Contrary to Petitioner's assertion, Statesman had the obligation before 1990 to pay in gold coin upon demand; Respondents had merely not invoked that option. American Life contends that the Trostel heirs' failure to demand payment in gold coin sooner indicates that there was no prior obligation, but this argument ignores the third paragraph of the lease, which states: "[I]t is expressly understood and agreed by and between the parties that no acceptance by the Lessor of any currency, legal tender, checks, coin, money, or value whatever, except standard gold coin of the United States of America, as hereinbefore specified, in payment of any installment of rent, shall be construed to be a waiver on the part of the Lessor of the right to demand the payment of any other unpaid installment of rent in standard gold coin of the United States of America . . . ." Resp. App. 1a-2a.

specific intent with respect to the gold clause before agreeing to be bound by its terms does not alter the plain, clear, and unambiguous language of the assignment,[5] which specifically adopted all of the terms of the 1917 lease.

IV. THE RECENT AMENDMENT OF § 5118 DOES NOT AFFECT THE EIGHTH CIRCUIT'S DECISION IN THIS CASE OR RAISE AN ISSUE THAT WARRANTS REVIEW BY THIS COURT.

Regardless of how Congress came to include this piece of legislation in the Economic Growth and Regulatory Paperwork Reduction Act, American Life is wrong in asserting that this amendment has reversed the opinion of the Eighth Circuit. The 1996 amendment to Section 5118(d)(2) provides that "any assignment or novation of [a pre-1977 gold clause] obligation after October 27, 1977" is not enforceable "unless all of the parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609 (1996). Although the validity and interpretation of the statute itself is an issue of federal law (though not one of federal importance), whether the parties "specifically agreed" to the gold clause is a question of state contract law and *not* a federal question.

Whether the 1996 amendment even applies to a particular transaction requires an initial determination of whether the

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5. Iowa law is clear: "a party is usually bound by the documents he signs even though . . . [he] has not expressly accepted all of the contract provisions or is even aware of them." *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W. 2d 317, 323 (Iowa 1977). "It is also the settled rule of law that if a party to a contract is able to read [the contract], has the opportunity to do so, and fails to read the contract he cannot thereafter be heard to say that he was ignorant of its terms and conditions for the purpose of relieving himself from its obligations." *Id.*

parties "specifically agreed" to a gold clause: if the answer is "Yes," then there is no federal issue to consider. In this case, the Eighth Circuit has already made this preliminary finding, and the panel stated in no uncertain terms that American Life "*specifically agreed* to be bound by the obligations described in the 1917 lease and its written amendments." 92 F.3d at 742 (emphasis added). Nothing could be more clear.[6]

If, as American Life contends, it can delete the gold clause because it did not specifically or separately agree to that provision, then every other provision of the lease agreement between American Life and the Trostel heirs is voidable at American Life's fancy. Petitioner's construction of the 1996 amendment requires one to believe that Congress intended to rewrite basic contract law by its use of the language "specifically agree to include a gold clause in the new agreement." However, it is a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. __, 130 L. Ed. 2d 225, 229 (1994). "As there exists no federal law of construction of contracts," *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990), the issue of whether the parties "specifically agree[d]" is governed by Iowa law.

To fully appreciate the absurdity of Petitioner's reasoning, one only has to ask what other provisions of the 1917 lease does American Life contend are unenforceable because it did not specifically agree to be bound by them. If American Life

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6. The Eighth Circuit further explained: "The language of the 1990 warranty agreement is not ambiguous. American Life agreed to be bound by the terms of the 1917 lease as recorded and as amended by the specified recorded amendments. The intent of American Life to be bound by these terms, which included an explicit gold clause, is expressed in clear and unambiguous language, and the contract thus should be enforced as written." *Id.* at 743.

believes that the assignment does not represent its consent to be bound by the "gold clause" in the 1917 lease, Petitioner can also contend that it is not bound by the provisions requiring payments on a monthly basis, that it is not bound to pay the taxes, or that it has not agreed to a lease at all! Under this logic, an American Life policyholder could similarly claim that an exclusion in a contract of insurance is not enforceable because he did not read it, did not know it existed, and did not intend to be bound by it. Would American Life agree that the exclusion was unenforceable?

Nonetheless, American Life again argues that there was no novation because it did not specifically consent to the inclusion of the gold clause in the lease assignment; the Trostel heirs have consistently contended that the lease documents establish American Life's specific agreement to *all* of the terms of the lease. The Eighth Circuit was presented with these competing accounts of the case and plainly decided that American Life was wrong. Regardless of whether this Court views the Eighth Circuit's conclusion as a factual finding or an interpretation of law (and state law at that), American Life's claim of error does not merit review. As Rule 10 states, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Accordingly, this Court should decline American Life's invitation to second-guess the Eighth Circuit's conclusion that the parties "specifically agreed" to the gold clause, thus rendering the 1996 amendment to § 5118(d)(2) facially inapplicable to this case.

Even under the most favorable interpretation of American Life's position, certiorari is not warranted. Assuming *arguendo* that there was no specific agreement to include the gold clause in the 1990 Warranty Agreement, such that the 1996 amendment

is applicable on its face, and further assuming that the Eighth Circuit erred in not deeming the amendment to be applicable to this unique case, under Rule 10's demanding standards for granting discretionary review, such a "misapplication . . . of law" is not a sufficient basis for granting certiorari. Jurisdiction in this Court is not exercisable merely to give the party defeated in the court of appeals another hearing. *See Magnum Import Co. v. Coty*, 262 U.S. 159 (1923). If, as American Life contends, the 1996 amendment indeed directly overruled the Eighth Circuit's decision below, then the issues herein raised are confined to the circumstances of this case. However, "this Court does not sit to satisfy scholarly interest . . . [or] for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Thus, under American Life's own theory of the case, this litigation does *not* raise a federal question "the settlement of which is of importance to the public," *Layne & Bowler Corp.*, 261 U.S. at 393. Instead it presents wholly unique issues of importance exclusively to Petitioner.

CONCLUSION

Petitioner has failed to present any issues sufficient to invoke the jurisdiction of the Supreme Court of the United States. For that reason, and for all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

JAMES M. DORAN, JR.
Counsel of Record
JOHN E. QUINN
JOHN W. HEACOCK
MANIER, HEROD, HOLLABAUGH & SMITH
A Professional Corporation
First Union Tower, Suite 2200
150 Fourth Avenue North
Nashville, Tennessee 37219
(615) 244-0030

JOHN R. CALDWELL
29 Ardmore Highway
P.O. Box 898
Fayetteville, Tennessee 37334

Attorneys for Respondents

APPENDIX A — ADDITIONAL RELEVANT PROVISIONS OF THE 1917 LEASE

Second. The Lessees covenant and agree to pay to the Lessor, as rent for said demised premises, during the first five years of said term, the annual rental of Twelve Thousand Dollars ($12,000.00), to be paid to the Lessor in equal monthly installments of One Thousand Dollars ($1,000.00), each in advance, on the first day of each month during said period of five years.

For the next succeeding forty-nine (49) years, the Lessees covenant and agree to pay to the Lessor, as rent for said demised premises, the annual rental of Fifteen Thousand Dollars (15,000.00), to be paid to the Lessor in equal monthly installments of Twelve Hundred Fifty Dollars ($1250.00) each, in advance on the first day of each month during said period of forty-nine years; and during the remaining forty-five (45) years of the term of this lease, the annual rental of Eighteen Thousand Dollars ($18,000.00), to be paid to said Lessor in equal monthly installments of Fifteen Hundred Dollars ($1500.00) each, in advance on the first day of each month during the remainder of the term of this lease.

* * *

At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

Third. It is expressly understood and agreed by and between the parties that no acceptance by the Lessor of any currency, legal tender, checks, coin, money, or value whatever, except standard gold coin of the United States of America, as

hereinbefore specified, in payment of any installment of rent, shall be construed to be a waiver on the part of the Lessor of the right to demand the payment of any other unpaid installment of rent in standard gold coin of the United States of America, and all rental provided for in this lease shall bear interest at the rate of eight per cent per annum, payable annually, after the same becomes due and delinquent.

APPENDIX B — PROVISIONS OF THE 1990 WARRANTY ASSIGNMENT AND ASSUMPTION

Know All Men By These Presents: That The Statesman Group, Inc., a corporation organized and existing under the laws of the State of Delaware ("Grantor") in consideration of the sum of $10.00 and other good and valuable consideration in hand paid does hereby sell, transfer, assign and setover unto American Life and Casualty Insurance Company, an Iowa insurance corporation ("Grantee") the leasehold estate ("Lease") more particularly described in that certain Lease dated June 27, 1917, and recorded in the office of the Recorder of Polk County, Iowa, on April 25, 1923, in Book 870, page 497, wherein Joseph Trostel is the Lessor and Morris Joseph and Jacob Joseph are the Lessees. . . .

* * *

2. That said Lease has not been cancelled, surrendered or modified except pursuant to those supplements above specified and that said Lease is in full force and effect.

* * *

8. The Grantee, its successors and assigns in consideration of the Assignment and Transfer to it of the said Lease:

> (a) hereby accepts, assumes, and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the Lessee in said Lease, as amended above described, from and after August 1, 1990, and covenants and agrees to faithfully comply with, carry out and perform all of the terms and covenants on the part of the Lessee under said Lease as so modified from and after said date; . . .